

# The Family Law Review

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# Mediating in Good Faith

by Andy Flink

I've often wondered about the differences of opinion that are formed in mediation when it relates to each parties perspective of what defines "mediating in good faith." I begin every session with a review of the guidelines that include the statement that all parties "affirm they have the capacity to conduct good faith negotiations." While everyone nods and agrees to mediate in good faith, does it mean they actually *will*?

Good faith negotiations are defined as the "honest intent to act without taking an unfair advantage over another person or to fulfill a promise to act, even when some legal technicality is not fulfilled." It can also be expressed as the "ability to negotiate abstract and comprehensive terms that encompass a sincere belief or motive without any malice or the desire to defraud others." Yet whether or not someone is conducting themselves "in good faith" in mediation is completely subjective. Even if you felt someone was being thoughtless, insensitive and rude, due to the nature of the process might that simply be their style? I believe that the purpose of good faith negotiations is to get parties embroiled in dispute to cooperatively move towards a mutually agreeable set of terms that ends the conflict and removes them from the court process. We may not resolve all of the issues but certainly it should be our intent to do so.

What are some obvious examples of what we might all consider negotiating in bad faith? Is there ever an issue that cannot be resolved in mediation? I've seen attorney's state that no matter what, a particular item will not get resolved regardless of the offer the other side makes. Recently I saw this happen in a case as it pertained to child support. Certainly the custodial parent (who made this claim) had some idea of what the offer needed to be to resolve the amount. This was not a discovery issue as the case had been lingering for some time. As well they had not disclosed the inability to resolve this in their opening statement. Regardless of how I sought to frame the issue to get creative there was no room for negotiation. Opposing counsel explained that they would have provided any additional information or documents before the session if asked. Since this issue was not disclosed until too late, the non-custodial parent refused to entertain the idea of drafting even a partial agreement and after four hours we had an impasse.

Late in a session one party suddenly announces, due to time constraints and another commitment, they must leave. We have mediated for several hours and are moving towards resolve. A request is then made that we should be able to spend their remaining thirty minutes drafting, signing and distributing the complete memorandum. Sure, there can be emergencies but most of the time this happens because parties don't schedule correctly and believe that the mediation will be resolved quickly. I've learned how to avoid this issue by asking *at the beginning of the session* if anyone has a time restriction. When this comes as a surprise I've

seen opposing counsel become very upset and not take very well to the abrupt exit – sending the case spiraling.

What happens when one or both sides demand late additions to the agreement that we have already reached? We are in the drafting stage and as we are writing the document additional requests are being made. To avoid this I ask



the following questions several times during the process: "Are there any other issues that you consider important that need to be addressed with regard to a comprehensive agreement?" "Have we addressed all of your concerns so I may be sure the other side is aware of them?" "Here is the list of items that I have from our discussion that we are seeking to resolve. Does this appear to include everything?" A simple check-in with both sides throughout the day as well to make sure they have addressed each of their concerns can go a long way to avoiding these late case issues.

Certainly all of us have seen examples of what we would consider negotiating "in bad faith." But if we clear our schedules and appear ready to negotiate, and reach out to opposing counsel beforehand to review potential issues, we arrive better equipped to settle. We may not completely eliminate the potential of bad faith negotiations, but at least we all do what we can for the parties who are there to settle, and need to settle, in order to move forward productively. **FLR**



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